

DELAWARE FREEDOM OF INFORMATION ACT

POLICY MANUAL FOR FOIA COORDINATORS

As of November 1, 2017

DISCLAIMER

The Delaware Department of Justice (“DOJ”) strives to ensure the dissemination of timely, accurate public information. The information contained in this manual is provided for your use and convenience. It is subject to change without notice. FOIA opinions issued by the DOJ and court decisions that interpret FOIA are frequently issued and at times, those authorities may contradict statements contained in this manual.

This guide is NOT intended to address every possible FOIA scenario or to eliminate the need to consult with the deputy attorney general who represents a State agency or with other Delaware counsel with respect to the FOIA requests a public body may encounter. The guide does not displace the statute, does not have the force of law or a court ruling, and is not binding on the DOJ, as every factual scenario will vary.

We will update this manual no less frequently than biennially to reflect changes in the FOIA statute, court decisions, and additions to the digest of FOIA opinions. The DOJ does not favor any one group over another, and the use of any link to an organization’s website herein does not constitute an endorsement of that organization. The DOJ disclaims responsibility for the content of any site referenced in this manual.

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INTRODUCTION

Delaware's Freedom of Information Act, also known as "FOIA" (29 *Del. C.* §§ 10001-10007), promotes governmental transparency, informs voters, and acknowledges that the government should not be solely responsible for determining what the public has a right to know.¹ It also underscores the importance of each citizen's ability to observe and monitor decision-making by public officials in a democratic society.

This manual is intended to be an "easy reference" guide to assist public body FOIA coordinators. It is intended to help FOIA coordinators and others to navigate the basic requirements of FOIA and to develop policies and protocols that will permit State agencies and public bodies to more easily respond to FOIA requests in a timely manner. This guide is NOT intended to address every possible FOIA scenario. The guide does not displace the statute and does not have the force of law of a court ruling. FOIA coordinators should continue to rely on their attorneys in order to ensure compliance with FOIA.

This manual will (i) explain the role of the FOIA coordinator, (ii) identify important deadlines, (iii) explain the fees a public body is permitted to collect in connection with FOIA records requests, (iv) define and discuss what constitutes a public body, (v) define and discuss what constitutes a public record, and (vi) outline the requirements for a public meeting. There are three appendices that provide links to useful samples such as request forms, response templates, a spreadsheet to track FOIA requests, helpful definitions from FOIA and summaries of Attorney General opinions,² judicial opinions, and other legal authorities from the past two years.

This manual and other FOIA resources from the Department of Justice are available at <https://attorneygeneral.delaware.gov/executive/open-government/>. FOIA opinions are available at <http://opinions.attorneygeneral.delaware.gov/>.

¹ See *Delaware Solid Waste Authority v. The News-Journal Co.*, 480 A.2d 628, 631 (Del. 1984).

² The Attorney General opinions included herein reflect our administrative review of FOIA petitions for determination is different from an opinion of a court. Although we may rely on these opinions as persuasive authority, previous opinions are not binding precedent that the Department of Justice must follow in future determinations.

SECTION 1. WHAT ARE THE DUTIES & RESPONSIBILITIES OF A FOIA COORDINATOR?

FOIA defines “FOIA coordinator” as the person designated by the public body to receive and process FOIA requests.³ Each public body is required to designate a FOIA coordinator, and various duties are delegated to the coordinator. The FOIA coordinator’s name and contact information must be published on the public body’s website and shared with the Attorney General, and the FOIA coordinator is permitted to delegate specific duties and functions to other public body employees.⁴

The FOIA coordinator is required to take the actions listed below.

- 1) Serve as the point of contact for FOIA requests
- 2) Coordinate the public body’s responses to FOIA requests
- 3) Assist the requesting party in identifying the records sought
- 4) Assist the public body in locating and providing the requested records
- 5) Work to foster cooperation between the public body and requesting party
- 6) Maintain a document that tracks all FOIA requests,⁵ which includes the following minimum information:
 - a) The requesting party’s contact information
 - b) The date the public body received the FOIA request
 - c) The public body’s response deadline
 - d) The date of the public body’s response (including the reasons for any extension)
 - e) The names, contact information and dates of correspondence with individuals contacted in connection with the FOIA requests
 - f) The dates of review by the public body

³ See 29 Del. C. § 10002(d).

⁴ See 29 Del. C. § 10003(g)(1).

⁵ See *Del. Op. Att’y Gen.* 17-IB33 (July 26, 2017) (noting that, despite the agency’s assertion it was engaging in ongoing verbal communication with the requestor during that time, the agency provided no evidence of such communications such as a FOIA log).

- g) The names of individuals who conducted such reviews
- h) Whether documents were produced in response to the FOIA request
- i) The amount of copying and administrative fees assessed
- j) The date of final disposition⁶

FOIA coordinators should also become familiar with the policies governing the examination, copying, and disclosure of public records. Those provisions, included at FOIA Sections 10003(a)-(m), include procedures that govern:

- 1) The form of FOIA requests;
- 2) The specific roles and duties of the FOIA coordinator;
- 3) A public body's response to FOIA requests;
- 4) A public body's response to a request for emails;
- 5) A public body's response to requests for noncustodial records;
- 6) A public body's review of records requested to determine whether records are exempt from disclosure pursuant to Section 10002(l);
- 7) The access a public body must provide for review of records; and
- 8) The fees applicable to searching, copying and producing public records (including photocopying rates, administrative fees, fees relating to microfilm and or/microfiche printouts and electronically generated records).

Finally, FOIA coordinators may be responsible for drafting the responses from their respective organizations to the Attorney General's Office should a citizen appeal the denial of a FOIA request or complain that a public body violated the open meeting requirements of FOIA Section 10004. FOIA coordinators should therefore familiarize themselves with the enforcement provisions of Section 10005(a)-(e) and be prepared to respond to and cooperate with requests for further information issued by the Attorney General's Office.

⁶ See 29 Del. C. §§ 10003(g)(1)-(3).

SECTION 2. WHAT ARE THE IMPORTANT DEADLINES FOR FOIA RECORDS REQUESTS?

FOIA Section 10003(h) sets specific deadlines for public bodies' responses to FOIA requests:

- 1) Public bodies must respond to FOIA requests as soon as possible, but no later than 15 business days (i.e., excluding weekends, holidays and other days that State offices are closed) after the receipt of the request.
- 2) The public body's response must indicate one of the following:
 - a) The public body is providing the records requested.
 - b) Additional time is needed because the request is for voluminous records, requires legal advice, or a record is in storage or archived.
 - i) Note: If the public body states that additional time is needed to respond to the FOIA request, it must cite one of these reasons as to why more time is needed and provide a good-faith estimate of how much additional time is required to fulfill the request.
 - c) The FOIA request is denied. If a FOIA request is denied in whole or in part, the public body must include a reason for the denial. However, the public body is not required to provide an index or any other compilation listing each record or part of a record that was denied.

SECTION 3. WHAT FEES MAY AN AGENCY COLLECT IN CONNECTION WITH PUBLIC RECORDS REQUESTS?

FOIA permits public bodies to defray the costs of complying with a records request by collecting certain fees, but it places limits on the amounts that may be charged, the circumstances under which they may be charged and the manner in which they may be collected. There are few exceptions.⁷ The rules regarding the various charges permitted by FOIA are summarized below.

A. Photocopying Fees

Section 10003(m) of FOIA sets forth the following rules respecting photocopies:

Standard-sized, black and white copies: Public bodies may not charge citizens for the first 20 pages of standard-sized, black and white copies. The charge for copying standard sized, black and white public records for copies over and above 20 are: \$0.10 per sheet (\$0.20 for a double-sided sheet). This charge applies to copies on the following standard paper sizes: 8.5" x 11", 8.5" x 14", and 11" x 17".

Oversized copies/printouts: The charge for copying oversized public records is as follows: 18" x 22", \$2.00 per sheet; 24" x 36", \$3.00 per sheet; documents larger than 24" x 36", \$1.00 per square foot.

Color copies/printouts: An additional charge of \$1.00 per sheet is to be assessed for all color copies or printouts for standard-sized copies (8.5" x 11", 8.5" x 14", and 11" x 17") and \$1.50 per sheet for larger copies.

⁷ The General Assembly may establish different rules respecting fees in the Delaware Code, and counties and municipalities may establish different rules in their respective codes. *See 29 Del. C. § 10003(m)*. In addition, administrative fees may be waived pursuant to the public body's statutorily-mandated FOIA policy. *See Section B. and n.8.*

B. Administrative Fees

Although FOIA appears to require a public body to charge so-called administrative fees under certain circumstances,⁸ the statute allows agencies to waive those fees.⁹ FOIA prohibits collection of administrative fees for requests requiring less than one hour of staff time to process.¹⁰

If a public body chooses to charge administrative fees, it must attempt to minimize those fees and assess only those fees that are reasonably required to process a request.¹¹ Administrative fees may include staff time associated with processing FOIA requests, including, without limitation (a) identifying records, (b) monitoring file reviews, and (c) generating computer records (electronic or paper print-outs).¹²

Public bodies may not charge fees associated with the “legal review” of records to determine whether any of FOIA’s listed exemptions, or any other exemptions, apply.¹³ **The statute does not expressly limit “legal review” to reviews conducted by an attorney.** This is an important note for public bodies that do not routinely rely on counsel to determine whether any of the FOIA exemptions apply. Where any person reviewing records conducts an independent legal analysis, it may be deemed to be a legal review.

Administrative fees must be billed per quarter hour and **they must be billed at the hourly pay grade of the lowest-paid employee capable of performing the service.**¹⁴

⁸ See 29 Del. C. § 10003(m)(2).

⁹ The policy mandated by Section 10003(b) “may include provisions for the waiver of some or all of the above administrative fees; provided that such waiver shall apply equally to a particular class of persons (i.e., nonprofit organizations).” *Id.*

¹⁰ See *id.*

¹¹ See *id.*

¹² See *id.*

¹³ See *id.* (“Administrative fees shall not include any cost associated with the public body’s legal review of whether any portion of the requested records is exempt from FOIA.”).

¹⁴ See *id.*

(1) Working with Third-Party Technology Service Providers to Fulfill a Request for Email Records

Consistent with FOIA's general mandate that charges for fulfilling document requests be reasonable, Section 10003(i)(1) requires that the public body fulfill requests for email records using its own staff and from its own records, if it can do so with reasonable effort. To the extent that the public body cannot do so, it must seek assistance from its information and technology personnel or custodians. Thus, in most circumstances, a third-party provider should NOT be a public body's first point of contact for email records. Failing to conduct a reasonable in-house search for the records might be deemed "not reasonable" by the DOJ and prevent the public body from defraying its costs.

For most State agencies, Delaware Department of Technology and Information ("DTI"), which provides third-party computer hosting services, will constitute an appropriate technology custodian. DTI currently charges \$100 per hour to conduct email searches for State public bodies.

FOIA coordinators should take the following steps to comply with Section 10003(i) and maximize the approval of charges for email searches and collection if challenged.

- 1) Identify the public employee most likely to have access to the email records identified in the FOIA request.
- 2) Request the employee to search email records for responsive documents.
- 3) If such an employee cannot be identified or is otherwise not able to conduct the search, work with the public body's information technology personnel to obtain the email records.
- 4) If the public body cannot obtain the email records requested from its own records with reasonable effort, contact the public body's third-party service provider to assist with the search.

C. Other Charges

Section 10003(m)(3) sets forth the following rules respecting materials on microfilm and microfiche:

Microfilm and/or microfiche printouts: Public bodies may not charge citizens for the first 20 pages of standard-sized, black and white material copied from microfilm and/or

microfiche. The charge for microfilm and/or microfiche printouts over and above 20 is \$0.15 per sheet.

Section 10003(m)(4) permits the following charges for providing electronically generated records:

Electronically generated records: Charges for copying records maintained in an electronic format will be calculated by the material costs involved in generating the copies (including but not limited to DVD, CD, or other electronic storage costs) and administrative costs.

Section 10003(j) permits a public body to recover the costs of obtaining its records from other custodians to the extent that the public body cannot fulfill a request from the records in its possession.

D. Estimates

In most cases, before a public body may impose charges on a requesting party in connection with a records request, the public body must first “provide an itemized written cost estimate to the requesting party, listing all charges expected to be incurred.”¹⁵ The requesting party may choose to revise, narrow or abandon its request in response to the estimate. Public bodies may not prepare an estimate of any charges in bad faith – either too high (to discourage the request) or too low (with the expectation of pursuing a later collection action). Failure to comply with the cost estimate requirement may result in a finding by the DOJ that the agency violated FOIA and is not entitled to collect fees.

E. Advance Payment

A public body may require some or all of the charges permitted under Section 10003 to be paid prior to any service being performed.¹⁶

¹⁵ See 29 Del. C. § 10003(i)(2) (email search); (j)(2) (noncustodial records search); (m)(2) (administrative fees).

¹⁶ See 29 Del. C. § 10003(m)(5).

HOW SHOULD YOU ESTABLISH FEES?

SUGGESTED APPROACH:

FOIA COORDINATORS SHOULD VERIFY THAT THEIR AGENCY'S FEE COLLECTION PRACTICES COMPLY WITH THE STATUTE AND ANY POLICIES PREVIOUSLY ADOPTED AND THAT ANY FEES ASSESSED MEET THE REASONABLENESS STANDARDS SET FORTH IN FOIA.

SECTION 4. AN OVERVIEW OF FOIA

A. WHAT IS A PUBLIC BODY?

It is important to know what types of agencies or organizations constitute public bodies upon which FOIA imposes duties. Most public bodies are required to comply with open meeting¹⁷ and public records¹⁸ requirements.

A. Statutory Definition

FOIA defines a “public body” as:

any regulatory, administrative, advisory, executive, appointive or legislative body of the State, or of any political subdivision of the State, including, but not limited to, any board, bureau, commission, department, agency, committee, ad hoc committee, special committee, temporary committee, advisory board and committee, subcommittee, legislative committee, association, group, panel, council or any other entity or body established by an act of the General Assembly of the State, or established by any body established by the General Assembly of the State, or appointed by any body or public official of the State or otherwise empowered by any state governmental entity, which:

- (1) Is supported in whole or in part by any public funds; **or**
- (2) Expends or disburses any public funds, including grants, gifts or other similar disbursements and distributions; **or**
- (3) Is impliedly or specifically charged by any other public official, body, or agency to advise or to make reports, investigations or recommendations.¹⁹

B. Discussion

How do you determine whether your organization is a public body? In most instances, the answer is clear. If you do not know whether the organization is a public body, however, consider the following information.

First, the organization must be a body of a type enumerated in the statute.

¹⁷ See Section 5 for a discussion of open meeting requirements and exemptions.

¹⁸ See Sections 4.B. and 4.C. for a discussion of public records requirements and exemptions.

¹⁹ 29 *Del. C.* § 10002(h).

Second, it must have been created or otherwise empowered by an agency of the government. Finally, it must either (i) be supported with public funds; or (ii) expend or disburse public funds; or (iii) be charged by a public official, body, or agency to advise or to make reports, investigations or recommendations.

To be a **public body**, it must be an organization that falls within this list:

regulatory, administrative, advisory, executive, appointive, or legislative bodies of the State; all political subdivisions of the State; and all other State boards, bureaus, commissions, departments, agencies, committees, ad hoc committees, special committees, temporary committees, advisory boards and committees, subcommittees, legislative committees, associations, groups, panels, and councils

If the organization is one of the types of bodies listed above, look at **how the organization was created**. Specifically, consider whether the organization (a) was established by an act of the Delaware General Assembly; (b) was established by a body that was established by the General Assembly; (c) was appointed by a body of, or public official of, the State; or (d) was “otherwise empowered” by any state governmental entity. If the entity was established, appointed, or otherwise empowered by a governmental entity, then consider the funding and purpose of the organization to determine whether it is a public body subject to FOIA.

Does the organization receive or disburse public funds, or advise a governmental entity? Once it is determined that the group is a body of one of the types listed above, created by one of the specified government actions, consider whether it meets one of the other three requirements: Is the group supported, in whole or in part, by public funds; or does it expend or disburse public funds (including gifts and grants); or was it impliedly or specifically charged by any public official, body, or agency to advise or make reports or recommendations. If the organization meets any of these requirements, it is a public body and must comply with FOIA, as long as it does not fall within an exemption.

C. Does the Group’s Enabling Statute Subject the Group to FOIA?

There are some groups that may not qualify as a public body as discussed above, but instead are subject to FOIA simply because the law by which they were created made them so. As a result, look at the Delaware law that authorized or created the group to determine whether it subjects the group to FOIA. For example, some entities that are expressly subject to FOIA because of their enabling statutes

are the Delaware Transportation Authority, the Agricultural Commodity Advisory Board, the Appalachia States Low-Level Radioactive Waste Commission, and the Health Resource Board. While not included in the enabling statute, those authorities established in by Chapter 14 of Title 16 are subject to FOIA in the FOIA statute²⁰.

D. Organizations Previously Found to be Public Bodies

The following agencies and organizations have been found to be public bodies in previous FOIA opinions and rulings:

School boards, Delaware Solid Waste Authority, Delaware Association of Professional Engineers, Council on Banking, Thoroughbred Racing Commission, Governor's Council on Equal Employment Opportunity, General Assembly (except when caucusing), Charter School Reform Working Group, Kent County Society for the Prevention of Cruelty to Animals, Camden-Wyoming Sewer & Water Authority, and the Trustees of New Castle Commons.

Additionally, subsets of bodies *may* also be public bodies, including, for example, an advisory board created by order of the Governor, or a town manager, or a mayor, or a cabinet secretary, or a “joint” meeting of various public bodies.

E. Does the Group Fall Within an Exception to the Definition of Public Body?

There are certain groups that are specifically excluded from the definition of public body, even though they would otherwise qualify as a public body. Three specific exclusions apply if the group is: (a) a caucus of the House or Senate (“Caucus” means members of the House of Representatives or Senate, of the same political party), who assemble to discuss matters of public business; or (b) part of the University of Delaware or Delaware State University, but not the Board of Trustees;²¹ or (c) a court or an arm of a court, such as the Board of Bar Examiners, or an agency that exists to support a court, such as the Administrative Office of the Courts or the Court on the Judiciary.²²

²⁰ *See id.*

²¹ *See 29 Del. C. § 10002(i).*

²² This Office has determined that (i) the courts are not public bodies for purposes of FOIA, *Del. Op. Att’y Gen.* 94-IO11 (Mar. 7, 1994), (ii) FOIA does not apply to the Board of Bar Examiners, because it is an “arm” of the Delaware Supreme Court, *Del. Op. Att’y Gen.* 95-IB01 (Jan. 18, 1995), (iii) the public records provisions of FOIA do not apply to the database maintained by the Administrative Office of the Courts to assist the clerks of the Delaware courts, notwithstanding that it is an agency created by act of the General Assembly, *Del. Op. Att’y Gen.* 94-IO11, and (iv) FOIA does not apply to

F. Organizations Previously Found Not to be Public Bodies

In addition to those groups that are specifically exempt from FOIA as more fully discussed above, the following groups are statutorily exempt or have been found not to be public bodies based on previous FOIA opinions and rulings:

Local Chapter of National Honor Society; and Cape Henlopen Senior Center.

There are also subsets of public bodies that have been found not to be public bodies, including:

Administrative staff meetings, “joint” meetings between various executive branch officials and consultants to review technical proposals, a chief administrative officer’s meetings with department heads to develop budget, a county attorney’s meetings with board of elections chair and consultant to draft redistricting ordinance, meetings between city finance director and stakeholders to discuss electric rate structure

the Court on the Judiciary, *Del. Op. Att’y Gen.* 95-IB02 (Jan. 24, 1995). *See also* Att’y Gen. Op. 96-IB03 (Jan. 2, 1996) (“The courts are not public bodies within the meaning of [FOIA]....”).

DO YOU THINK YOU MIGHT NOT BE A PUBLIC BODY?

SUGGESTED APPROACH:

IF YOU ARE NOT SURE WHETHER YOU ARE A PUBLIC BODY, OR WHETHER YOU MIGHT BE EXEMPT FROM FOIA'S REQUIREMENTS, ERR ON THE SIDE OF CAUTION AND CONSULT A DELAWARE ATTORNEY. FOIA IS TO BE LIBERALLY CONSTRUED AND ANY STATUTORY EXCEPTIONS ARE STRICTLY INTERPRETED.

B. *WHAT ARE PUBLIC RECORDS?*

WHY IS IT IMPORTANT TO KNOW IF A PUBLIC BODY HAS CREATED OR POSSESSES A PUBLIC RECORD?

FOIA requires a public body to permit the inspection of or to provide copies of public records upon request.²³ Public bodies must be able to identify documents and electronically stored information that constitute public records to comply with their statutory obligations under FOIA. In addition, every public official and employee of state or local government has important legal obligations under the Delaware Public Records Law.²⁴ State and local government officials and employees must adequately document the transaction of public business, retain and protect all public records in their custody, and destroy or otherwise dispose of public documents only in accordance with retention and disposal schedules approved by Delaware Public Archives. Unlike FOIA violations, which have no criminal penalty, violations of the Delaware Public Records Law are deemed unclassified misdemeanors, the penalties for which include fines of up to \$500, up to three (3) months imprisonment, or both.

WHAT IS A PUBLIC RECORD?

The definition of “public record” under FOIA is very broad.²⁵ It includes all information contained in or on physical documents (typically paper), as well as information stored in electronic format (such as Word, Excel, etc.) or databases, relating in any way to public business, or in any way of public interest, or in any way related to public purposes. **Thus, as a practical matter, FOIA’s concept of “public record” covers, at least initially, almost every conceivable type of physical or electronic record that may be created, maintained or possessed by**

²³ See 29 Del. C. § 10003(a).

²⁴ A thorough description of the additional and independent requirements of the Delaware Public Records Law is beyond the scope of this manual. Questions should be directed to the employee(s) charged with overseeing the agency’s or public body’s compliance with the Public Records Law, the Deputy Attorney General assigned to represent the agency or public body, or other counsel retained to assist the agency or public body. The Department of Justice is only authorized to provide legal advice and guidance to agencies and public bodies as described in Title 29, Chapter 25 of the Delaware Code.

²⁵ The definition of “public record” is subject to certain statutory and common law exemptions that will be discussed in greater detail in subsection C, below.

a public body. The concept of a “public record” under FOIA is not limited to information relating to a particular matter of “public business” that may be up for consideration or discussion during a meeting of a public body. Instead, the definition expressly encompasses any information that may be a matter of “public interest,” or which relates in any way to “public purposes.” These expansive concepts (“public interest” and “public purposes”) are not defined in FOIA and have not been explained or refined by the courts.

ASSUMING NO EXEMPTIONS OR EXCLUSIONS APPLY, MUST A PUBLIC BODY PRODUCE A RECORD THAT IT POSSESSES EVEN IF THE RECORD WAS CREATED BY ANOTHER PUBLIC BODY OR A PRIVATE PERSON OR ENTITY?

Yes. FOIA’s definition of “public record” covers information retained, received, compiled or collected by any public body.²⁶ Thus, if no exemptions apply, records **may** need to be disclosed in response to a FOIA request regardless of whether the information is owned or was made, used, produced, composed or drafted by the public body receiving the FOIA request. Consultation with counsel is advisable if the public body’s obligations are unclear.

WHAT IF THE PUBLIC BODY THAT RECEIVED THE FOIA REQUEST IS NOT THE SAME PUBLIC BODY THAT CREATED OR MAINTAINS THE INFORMATION?

If the public body does not have the information, the public body should notify the requestor that the body receiving the request does not maintain the information, notify the public body that maintains the information of the request, and if necessary, provide a copy of the FOIA request to the other public body. If, however, the public body has a copy of the information, the public body may be required to disclose records in its possession even if it did not create those records. Consultation with counsel is advisable if the public body’s obligations are unclear.

WHAT IF SOME OF THE RECORDS IDENTIFIED IN RESPONSE TO A FOIA REQUEST WERE RECEIVED FROM ANOTHER PUBLIC BODY IN AN EMAIL OR ENVELOPE DESIGNATED “CONFIDENTIAL,” “PRIVATE,” OR “PRIVILEGED”?

The public body will need to produce the information unless a statutory

²⁶ See 29 Del. C. § 10002(l).

exemption or exclusion applies, whether that exemption or exclusion is found in Delaware's FOIA or elsewhere. For example, protected health information under the federal HIPAA or other state or federal privacy laws, FERPA records maintained by schools, and other information protected under state or federal law is confidential and not subject to disclosure regardless of whether the correspondence is marked "confidential."²⁷ The public body will need to determine whether and to what extent a particular record may be withheld under an exemption or exclusion. The public body may consult with the public body or private person or entity designating the information as "confidential," "private," or "privileged" to help make this determination. Consultation with counsel is advisable if the public body's obligations are unclear.

DOES THE FORMAT IN WHICH THE ORIGINAL DOCUMENT IS MAINTAINED MATTER FOR PURPOSES OF RESPONDING TO A FOIA REQUEST? WHAT IF THE MATERIAL IS IN A DATABASE?

No, the format of the records maintained by the public body does not matter. A "public record" is defined as "information of any kind, owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected..."²⁸ Therefore, it is clear that the underlying information is what is subject to FOIA. However, a request for an electronic record is not the same as a request for copies, and a public body must produce records in electronic format upon request if they already exist in electronic format.

HOW SHOULD THE MATERIAL BE PROVIDED? WOULD ALLOWING PUBLIC INSPECTION BY THE REQUESTING PARTY SATISFY THE REQUEST IN LIEU OF PROVIDING PHYSICAL COPIES?

FOIA only requires that the public be provided reasonable access to and reasonable facilities for copying of records, and that "[a]ll public records shall be open to inspection and copying during regular business hours by the custodian of the records for the appropriate public body."²⁹ However, if a request for records can be accommodated with reasonable effort by providing those records in the format requested, the public body is encouraged to do so.

²⁷ A non-exhaustive list of records exempted by Delaware statute or rule are is included at Appendix A.

²⁸ 29 Del. C. § 10002(l).

²⁹ 29 Del. C. § 10003(a).

DOES A PUBLIC BODY HAVE TO CREATE REPORTS IN RESPONSE TO A FOIA REQUEST?

No. A public body does not have to create new reports or records in order to respond to a FOIA request, but agencies should be reasonably accommodating to requests when they do not impose an undue administrative burden on the agency.

WHAT IS MY OBLIGATION TO SEARCH MY FILES TO IDENTIFY PUBLIC RECORDS IN RESPONSE TO A FOIA REQUEST?

A public body is obligated to conduct a reasonable search to determine whether it has any responsive documents in its possession. For example, and as discussed on page 7 above, the public body may need to work with its IT professionals to locate older email records in order to satisfy FOIA's "reasonableness" requirement.³⁰ DTI retains most emails for no longer than 12 months.³¹

MAY I CHARGE TO SEARCH MY FILES TO IDENTIFY PUBLIC RECORDS? IF SO, WHAT IS THE PERMITTED CHARGE?

Yes. The General Assembly has made clear that, beyond a limited threshold, the costs of producing records may be shifted to the requestor.³²

³⁰ See 29 Del. C. § 10003(i)(1)-(2).

³¹ See DTI "Disclosure of Individual User e-Resource Records" policy, *available at* <http://dti.delaware.gov/pdfs/pp/eRecordsRequestPolicy.pdf>.

³² See 29 Del. C. § 10003(m) and Section 3 of this Manual for a discussion of fees and other costs that may be charged in connection with fulfilling a FOIA request.

C. WHAT RECORDS ARE EXEMPT FROM PUBLIC DISCLOSURE?

FOIA exempts several categories of records from disclosure, and there are other statutory exemptions that may apply as well. Unless a specific statutory exemption applies, public records must be disclosed. If you have questions regarding whether a specific exemption applies to a FOIA request, consult the attorney for your agency or organization.

The following list, based on Sections 10002(l)(1)-(19), describes most records exempted from disclosure by FOIA:

- 1) **Personnel files:** Files created as a condition of an employee's employment with a public body or relating to the employee's status and performance as an employee, if disclosure would constitute an invasion of personal privacy.
- 2) **Medical files:** Files containing any individual's medical information, if disclosure would constitute an invasion of personal privacy.
- 3) **Pupil files:** Records containing protected student information, if disclosure would constitute an invasion of personal privacy.
- 4) **Trade secrets:** Information that derives economic or commercial value from the fact that it is not generally known to or obtainable by others who could use the information for economic or commercial gain.
- 5) **Confidential commercial or financial information:** Commercial or financial information obtained from a person that is kept confidential by that person in order to maintain its economic or commercial value.
- 6) **Investigatory files (civil or criminal):** Files relating to pending or completed investigations, including pretrial and presentence investigations, and child custody/adoption files.
- 7) **Criminal files and criminal records:** Files containing an individual's criminal records or history, if release would constitute an invasion of privacy.
- 8) **Intelligence files compiled for law enforcement purposes:** Information assembled for a law enforcement purpose that could cause risk to public safety if released.
- 9) **Records specifically exempted by statute or common law:** This category includes records protected from disclosure by a specific statute or a

recognized common law doctrine, such as the attorney-client privilege, the attorney work-product doctrine, and privacy. A non-exhaustive list of records exempted by Delaware statute is included at Appendix A.

10) Records which disclose the identity of the contributor of a bona fide and lawful charitable contribution where public anonymity has been requested by the contributor.

11) Records involving labor negotiations or collective bargaining.

12) Records pertaining to pending or potential litigation that are not records of any Court.

13) Any records of discussions held in executive session pursuant to FOIA Sections 10004(b) and (c).

14) Records that disclose the identity or address of any person holding a permit to carry a concealed deadly weapon.

15) Records of a public library which contain the identity of a user and the books, documents, films, recordings or other property of the library which a patron has used.

16) Records in the possession of the Department of Correction, if disclosure is sought by an inmate in custody of the Department of Correction.

17) Investigative files compiled or maintained by the Victim's Compensation Assistance Program.

18) Photographs, video records or audio recordings of a postmortem examination in the possession of the Division of Forensic Science.

19) Emails received or sent by members of the Delaware General Assembly or their staff.

20) Various records which, if copied or inspected, could jeopardize the security of any structure owned by the State or any of its political subdivisions, or could facilitate the planning of a terrorist attack, or could endanger the life or physical safety of an individual.

21) Military service discharge document or documents, a discharge, separation notice, certificate of service, report of transfer or discharge, or any other document which is evidence of severance or transfer from military service and which contains a service record from the armed forces of the United States.

22) Any communications between a member of the General Assembly

and that member's constituent, or communications between members of the General Assembly.

As noted above, there may be other applicable exemptions that do not appear in FOIA. For example, this Office has opined that a draft document will not be a public record, unless it is circulated to a public body. Similarly, personal notes will not constitute public records provided that they are created for convenience of an individual, and are not circulated or maintained in the public body's files. Finally, if there is another statutory provision that prevents disclosure, the documents will not constitute public records under FOIA.

**DO YOU THINK A FOIA REQUEST SEEKS DOCUMENTS
THAT MAY NOT BE PUBLIC RECORDS?**

SUGGESTED APPROACH:

IF YOU ARE NOT SURE WHETHER THE INFORMATION IS A PUBLIC RECORD, OR WHETHER DISCLOSURE MIGHT BE EXEMPT FROM FOIA'S REQUIREMENTS, CONSULT AN ATTORNEY.

THE EXEMPTIONS LISTED IN FOIA ARE TO BE NARROWLY CONSTRUED AND ANY STATUTORY EXCEPTIONS ARE STRICTLY INTERPRETED.³³

SECTION 5. OPEN MEETINGS

A. GENERAL REQUIREMENTS

FOIA generally mandates that “[e]very meeting of *all* public bodies shall be

³³ See *Am. Civil Liberties Union of Delaware v. Danberg*, 2007 WL 901592, at *3 (Del. Super. Mar. 15, 2007) (“The enumerated statutory exceptions to FOIA, including the ‘pending or potential litigation’ exception, pose a barrier to the public's right to access and are, therefore, narrowly construed.”).

open to the public” unless expressly exempted by statute.³⁴ FOIA also contains requirements respecting notice of the meeting, the agenda for the meeting, the preparation of meeting minutes, and other matters described below.

A. “Meeting” Defined

A “meeting” is a formal *or* informal gathering of a quorum of the members of any public body for the purpose of discussing or taking action on public business, either in person or by video-conferencing.³⁵

Several examples of meetings that a public body might hold and that may fall within FOIA’s open meeting requirements are listed below.

- 1) Breakfast meetings: Breakfast meetings of at least a quorum of a public body that include the discussion of public business are subject to the open meeting law.
- 2) Informal meetings: Informal meetings of members of city council and meetings of school board members in advance of public meetings or in informal locations such as restaurants have been subject to FOIA’s open meeting requirements.³⁶ Informal meetings can be subject to FOIA’s open meeting requirements even if no formal decision about the public business discussed is reached.³⁷
- 3) Workshops: Workshops held by public bodies that discuss public business

³⁴ 29 Del. C. § 10004(a) (emphasis supplied). Among those public bodies that are exempt from open meeting requirements, are, for example, public bodies with only one member, such as the Governor, a town’s mayor, or a county administrator. Determining whether a public body is exempt from open meeting requirements is a fact-specific determination and should not be made without consulting legal counsel. Also exempt from open meeting requirements are jury deliberations, court deliberations, and meetings and deliberations of the Board of Pardons and Parole. See 29 Del. C. § 10004(h) for the list of exceptions to FOIA’s open meeting requirements.

³⁵ 29 Del. C. § 10002(g) (emphasis supplied).

³⁶ In contrast, in *Del. Op. Att’y Gen.* 95-IB20 (June 15, 1995), this Office found no FOIA violation where the school board held administrative staff meetings attended by less than a quorum of the board, and the board members who attended did not make “any formal or informal, express or implied recommendations” to the full board based upon what was discussed at the administrative staff meetings.

³⁷ See *Levy v. Board of Education of Cape Henlopen School District*, 1990 WL 154147, at *6 (Del. Ch. Oct. 1, 1990) (“Because informal gatherings or workshops are part of the decision-making process they too must be conducted openly.”).

are subject to FOIA's open meeting requirements.³⁸

- 4) Non-public activities: Non-public activities of a quorum of members, such as a tour, may be viewed with suspicion by the public and the courts. Consult with counsel if you are unsure whether such activity might be a public meeting.
- 5) Joint meetings of agencies: Whether FOIA applies to joint meetings attended by less than a quorum of the members of each agency represented must be assessed on a case-by-case basis.
- 6) Teleconferences: FOIA does not permit public bodies to convene a meeting via teleconference. While a member of the public body may participate in a meeting by telephone, his or her attendance is not counted for quorum purposes.³⁹
- 7) Electronic meetings: Group emails may amount to a meeting of the public body, in violation of FOIA under certain circumstances.⁴⁰

B. Meetings of Committees

Section 10002(h) of FOIA broadly defines "public body" to include committees.

C. Meeting Location

Section 10004(g) limits the permissible locations for public body meetings. For example, every regularly scheduled meeting of a public body must be held within the geographic jurisdiction of that public body.⁴¹ Additionally, if the public body serves a political subdivision of the State (including any city, town or school district), that public body must hold all meetings within its jurisdiction or within the county in which its principal office is located.⁴²

FOIA includes a limited exception to this requirement for "any emergency

³⁸ See *id.*

³⁹ See *Del. Op. Att'y Gen.* 04-IB13 (June 1, 2004) (finding that participation by one board member telephonically was permitted so long as a quorum was present in person and the member participating telephonically is "clearly audible" to those in the audience.)

⁴⁰ See *Del. Op. Att'y Gen.* 17-IB09 (April 25, 2017); *Del. Op. Att'y Gen.* 03-IB11 (May 19, 2003);

⁴¹ 29 *Del. C.* § 10004(g). A "regularly scheduled meeting" is defined as any meeting of a public body held on a periodic basis. *Id.* at 10004(g)(2).

⁴² *Id.* at 10004(g)(1). There is an exception for certain school board training sessions. *Id.*

meeting which is necessary for the immediate preservation of the public peace, health or safety, or to a meeting held by a public body outside of its jurisdiction which is necessary for the immediate preservation of the public financial welfare.”⁴³

D. The “Open” Requirement

For a public meeting to be truly “open,” it must be held in a place where anyone who wishes to attend can be accommodated. Holding a public meeting in a facility that is inadequate or too small to accommodate all the people who may wish to attend may violate FOIA. Although not covered in the FOIA statute, public bodies should also be aware of federal and state laws relating to the accommodations of persons with disabilities when selecting public meeting locations.

E. Public Attendance and Participation

FOIA does not require that any member of the public attend a public meeting; it requires only that citizens have timely notice of public meetings so that they can attend and observe their government if they so choose.

FOIA requires that citizens be permitted to observe, but it provides them no express right to participate in a public meeting.⁴⁴ If a public body chooses to permit public participation, the public body may restrict the opportunity for public comments to a designated time on the agenda.⁴⁵ Additionally, FOIA authorizes “the removal of any person from a public meeting who is willfully and seriously disruptive of the conduct of such meeting.”⁴⁶

F. Exempt Bodies or Proceedings

Unless a public body or specific portion of its procedure is exempted from the requirements by FOIA or another statute, FOIA’s open meeting provisions will be liberally construed in favor of application to the public body. Section

⁴³ 29 Del. C. § 10004(g)(3).

⁴⁴ See *Reeder v. Delaware Dept. of Ins.*, 2006 WL 510067, at *12 (Del. Ch. Feb. 24, 2006) (“There is nothing in the text of the declaration of policy or the open meeting provision requiring public comment or guaranteeing the public the right to participate by questioning or commenting during meetings. What is provided by FOIA generally, and by the open meetings provision in particular, is public access to attend and listen to meetings.” (citations omitted)) *aff’d sub nom. Reeder v. Delaware Dept. of Ins.*, 931 A.2d 1007 (Del. 2006); *Del. Op. Att’y Gen.* 03-IB06 (Feb. 11, 2003).

⁴⁵ See *id.*

⁴⁶ 29 Del. C. § 10004(d).

10004(h)(7) provides that the open meeting requirements do not apply to the proceedings of the following groups/boards/commissions:

- 1) Grand juries;
- 2) Petit juries;
- 3) Special juries;
- 4) The deliberations of any court;
- 5) The Board of Pardons and Parole;
- 6) Public bodies having only one (1) member; or
- 7) Certain public bodies within the legislative branch of the State that are not specified in the Delaware Code, such as standing ethics committees. (But the full House and Senate, their standing committees and committees and task forces created by legislative resolution are subject to open meeting requirements.)⁴⁷

Section 10004(h)(9) provides that the deliberations in case decisions of Delaware's Industrial Accident Board, Human Relations Commission, Victims Compensation Appeal Board and Tax Appeals Board are exempt from the open meeting requirements.

G. Notice Requirements

Regular Meetings: A "regular meeting" is one that is held on a periodic basis.⁴⁸ Section 10004(e)(2) of FOIA mandates that all public bodies provide the public with notice of their regular meetings and, if applicable, of their intent to hold

⁴⁷ The final entry paraphrases the statute. The "public bodies within the legislative branch" that are listed follow the phrase "other than," which means that they *are* subject to the open meeting requirements (with the exception of "ethics committees").

The enumerated legislative bodies that *are expressly subject to the open meeting requirement* are "the House of Representatives, the Senate, the Joint Finance Committee, the Joint Committee on Capital Improvement, the Joint Sunset Committee, Legislative Council, committees ... specifically enumerated and created by Resolution of the House of Representatives and/or Senate or task forces specifically enumerated and created by Resolution of the House of Representatives and/or Senate." *Id.*

⁴⁸ See 29 Del. C. § 10004(g)(2).

an executive session closed to the public. Notice of a regular meeting must be provided at least seven (7) days in advance of the date of the meeting.

Special Meetings: A “special meeting” is a meeting “to be held less than seven (7) days after the scheduling decision.”⁴⁹ Section 10004(e)(3) of FOIA requires that special meetings be noticed as soon as is reasonable, and no less than twenty-four (24) hours before the meeting. The notice of a special meeting must contain an explanation why the public body could not provide at least seven (7) days’ notice.

Section 10004(e) also requires the following in connection with notices of all open meetings:

- 1) The notice must include the meeting agenda (discussed on page 26).
- 2) The notice must include the date, time, and place of the meeting, including whether the meeting will be conducted by video conference.
- 3) A reasonable number of copies of the notice must be made available at the meeting.
- 4) The notice must be posted.
 - a) All public bodies must post conspicuously at the principal office of the public body, or if no such office exists, at the place where meetings of the public body are regularly held.
 - b) All non-county and non-municipal public bodies must also post the notice electronically on a designated State of Delaware website that has been approved by the Registrar of Regulations by May 1, 2013. A calendar of events and hearing notices for these public bodies is available online at <http://regulations.delaware.gov/services/register.shtml>.
 - c) In addition, public bodies in the executive branch of state government that are subject to FOIA, must post the notice electronically on the designated State of Delaware website approved by the Secretary of State. Notices of public meetings for

⁴⁹ 29 Del. C. § 10004(e)(3).

public bodies in the executive branch of Delaware State government are available online at <https://publicmeetings.delaware.gov/>.

H. Agenda Requirements

Section 10002(a) requires that the agenda for an open meeting include a general statement of the major issues expected to be discussed at the meeting. If the public body intends to hold an executive session, it must be stated in the agenda, along with the specific grounds for the executive session.⁵⁰

FOIA permits some flexibility regarding the contents of the agenda to allow the public body to discuss items that arise during the meeting. Thus, Section 10004(e)(2) of FOIA provides: “the agenda shall be subject to change to include additional items including executive sessions or the deletion of items including executive sessions which arise at the time of the public body’s meeting.”

Additionally, Section 10004(e)(5) of FOIA recognizes that there may be rare and exceptional circumstances in which a public body may not be able to post the meeting agenda at the time it posts the meeting notice. In such circumstances, the agenda must be posted at least six (6) hours in advance of the public meeting, and the reasons for the delayed posting must be set forth briefly in the agenda.

I. Meeting Minutes

Section 10004(f) of FOIA provides that public bodies must keep minutes of all public meetings, including executive sessions.⁵¹ The minutes must include a record of members present and a record, by individual member, of each vote taken and each action agreed upon. The minutes must be made available for public inspection and copying as a public record, but they may be temporarily withheld from public disclosure for so long as public disclosure would defeat the lawful purpose for the executive session.

J. Cancelling or Rescheduling a Public Meeting

FOIA does not prohibit the cancellation of a public meeting, and a public body may decline to reschedule the meeting if it is no longer needed. If the meeting

⁵⁰ 29 *Del. C.* § 10002(a).

⁵¹ FOIA does not require a public body to transcribe or tape record the entirety of its meetings.

will be rescheduled, the public body must provide another notice.

FOIA allows a public body to hold a “rescheduled” meeting within seven (7) days of the original meeting date. In that case, the public body must give notice of the meeting “as soon as reasonably possible,” but no later than 24 hours before such meeting. In addition, the notice must include an explanation as to why the seven-day notice required by Section 10003(e)(2) could not be provided.⁵²

If a meeting is scheduled more than seven (7) days after the original meeting date noticed, FOIA does not consider the meeting to be a “rescheduled” meeting. Rather, this is a new meeting, and the ordinary notice provisions apply.

⁵² See 29 *Del. C.* § 10004(e)(3).

B. MEETING IN EXECUTIVE SESSION

FOIA requires that “[e]very meeting of all public bodies . . . be open to the public except those closed pursuant to subsections (b), (c), (d) and (h)” of 29 *Del. C.* § 10004.⁵³ In limited circumstances, a public body is permitted to hold all or a portion of its meeting without public attendees, or in “executive session.”

A. When is an Executive Session Permitted?

Unless otherwise permitted by the public body’s enabling statute,⁵⁴ the circumstances listed in FOIA “**are exclusive and form the only basis for entering into closed session.**”⁵⁵ Section 10004(b) provides that a public body may hold meetings in executive session only when discussing the following topics:

- 1) Individual’s qualifications to hold job or pursue training (unless the individual requests that the meeting be open). This exemption does not apply “to the discussion by a licensing board or commission subject to [29 *Del. C.* § 8375], of an individual citizen’s qualifications to pursue any profession or occupation for which a license must be issued by a public body in accordance with Delaware law.”⁵⁶
- 2) Preliminary discussions of site acquisitions for any publicly funded capital improvements or sales or leases of real property. This basis for executive session exists “to ‘protect the government when it enters the marketplace to purchase real property as an ordinary commercial buyer or seller.’”⁵⁷
- 3) Activities of any law-enforcement agency in its efforts to collect information leading to criminal apprehension.
- 4) Strategy sessions with respect to collective bargaining or pending or potential litigation. This exception only covers a public body’s

⁵³ 29 *Del. C.* § 10004(a).

⁵⁴ See Section 4.C., above, for examples of public bodies that are permitted to meet in executive session by their enabling statute.

⁵⁵ See *Del. Op. Att’y Gen.* 12-IIB09 (July 13, 2012) (quoting *Del. Op. Att’y Gen.* 80-FOI3 (Aug. 30, 1980)).

⁵⁶ 29 *Del. C.* § 10004(b)(1).

⁵⁷ *Del. Op. Att’y Gen.* 05-IB24 (Aug. 18, 2005) (quoting *Del. Op. Att’y Gen.* 02-IB27 (Nov. 4, 2002)).

discussion with its attorney *if* the discussion involves pending or potential litigation, and *only* when an open meeting would have the adverse effect on the bargaining or litigation position of the public body.⁵⁸

- 5) Discussions which would disclose the identity of a lawful/bona fide contributor of a charitable contribution to a public body when public anonymity has been requested.
- 6) Discussion of the content of documents excluded from the definition of “public record.” The definition of “public record” is set forth in Section 4.B., above.
- 7) Student Disciplinary Cases (unless the student requests an open public hearing). Employee disciplinary or dismissal cases (unless the employee requests an open public hearing).
- 8) Personnel or student matters in which the names, competency and abilities of individual employees or students are discussed (unless the employee or student requests an open public meeting).⁵⁹

B. Requirements for Meeting in Executive Session

A public body must satisfy the following requirements in connection with meetings in executive session:

- 1) Advance Notice: The intent to convene in executive session must be announced in the notice of the meeting, whether it is a “regular” meeting or a “special or rescheduled” meeting.⁶⁰ Likewise, a brief statement of the reasons for convening in executive session must be set forth in the agenda for the meeting.⁶¹ While the public body must

⁵⁸ See 29 Del. C. § 10004(b)(4); *see also* *Chemical Industry Council of Delaware, Inc. v. State Coastal Zone Industrial Control Board*, 1994 WL 274295, at *11 (May 19, 1994).

⁵⁹ *Del. Op. Att’y Gen.* 17-IB20 (July 12, 2017) (noting that the agenda need not identify the names of the individual to be discussed and contains no mandate that the public body notify the individual that he/she is the subject of the executive session or to affirmatively present the individual the option to have the discussion occur in open session).

⁶⁰ See 29 Del. C. §§ 10004(e)(2), (e)(3). Notwithstanding the fact that FOIA requires public notice of a public body’s intent to convene an executive session, FOIA recognizes that in limited circumstances, a public body shall be permitted to amend its agenda to add or delete an executive session for matters “that arise at the time of the public body’s meeting.” 29 Del. C. § 10004(e)(2).

⁶¹ See 29 Del. C. § 10004(c).

disclose the purpose of the executive sessions in the agenda, it does not have to specify what legal, personnel, or other subjects will be discussed in executive session.⁶²

- 2) **Public Body Vote:** The public body must approve the decision to enter executive session by a majority vote at the meeting, during the open portion of the meeting. If the matter discussed in executive session is one upon which the public body must vote, the vote may not be taken in executive session. The public body must return to the public session to take the vote.⁶³
- 3) **Limited Discussion:** The public body must limit the discussion during the closed session to public business that falls within one of the purposes allowed by Section 10004(b) for such meetings.
- 4) **Prepare Minutes:** The public body must prepare minutes of any closed session and make them available as public records for public inspection, except that the minutes may be temporarily withheld from public disclosure for so long as disclosure would defeat the lawful purpose for holding the executive session.⁶⁴ The minutes must also reflect who was present.⁶⁵

The foregoing requirements must be met even when a public body is meeting to discuss only matters that are authorized for executive session.

C. Permitted Attendees at an Executive Session

It is clear from the language of FOIA that executive sessions are generally closed to non-members of a public body. The public body may not invite non-member observers.

However, the statute implicitly permits the attendance of certain non-members necessary to conduct the proceedings expressly authorized to be held in executive session. For example, a public body may invite persons to present testimony or opinions limited to the purpose of the session, provided that such

⁶² See *Common Cause of Del. v. Red Clay Consol. Sch. Dist.*, 1995 WL 733401, at *4 (Del. Ch. Dec. 5, 1995).

⁶³ See 29 Del. C. § 10004(c).

⁶⁴ See *Levy*, 1990 WL 154147, at *3; 29 Del. C. § 10004(f).

⁶⁵ See 29 Del. C. § 10004(f).

attendance is limited to the portion of the discussion in connection with which such testimony or opinion is needed. The exceptions also implicitly permit the presence of attorneys to discuss litigation strategy, or teachers and school administrators in student discipline cases. There may be other limited circumstances in which FOIA may permit a public body to invite individuals to attend an executive session to provide subject matter expertise relating to the subject for which the executive session is authorized.

Even if a public body properly calls a meeting in executive session, **all voting must take place in open session and the results of that vote must be made public.**

SHOULD A PUBLIC BODY MEET IN EXECUTIVE SESSION?

SUGGESTED APPROACH:

IT IS IMPORTANT THAT THE PUBLIC BODY INCLUDE NOTICE OF ITS INTENTION TO MEET IN EXECUTIVE SESSION ON THE NOTICED AGENDA OF ITS MEETING. THE AGENDA MUST ALSO INCLUDE A BRIEF, NONSPECIFIC DESCRIPTION OF THE REASONS FOR CALLING THE EXECUTIVE SESSION. DO NOT MEET IN EXECUTIVE SESSION UNLESS YOU ARE CERTAIN ONE OF THE PERMITTED REASONS FOR MEETING IN EXECUTIVE SESSION IS APPLICABLE. OTHERWISE, ANY ACTION TAKEN BY THE PUBLIC BODY MAY BE STRUCK DOWN AS VOID BY THE DELAWARE COURTS.

SECTION 6. SELECTED DEFINITIONS

“Agenda” shall include but is not limited to a general statement of the major issues expected to be discussed at a public meeting, as well as a statement of intent to hold an executive session and the specific ground or grounds therefor[] under subsection (b) of Section 10004 of this title.

“An agenda serves the important function of notifying the public of the matters which will be discussed and possibly voted on at a meeting, so that members of the public can decide whether to attend the meeting and voice their ideas or concerns.”⁶⁶ The statutory language only requires the agenda to include a “general statement” of the topic to be discussed by the public body. The agenda should be worded “in plain and comprehensible language.”⁶⁷ But, if the public body knows that the subject is important to the community, “it satisfies neither the spirit nor the letter of the [Act] to state it in broad generalities so as to fail to draw the public’s attention.”⁶⁸

- **The adequacy of an agenda will be judged in light of the factual circumstances pertaining to each case.⁶⁹ This Office has found public meeting agendas to be deficient for a variety of reasons, but the most common is inadequate disclosure. Following the suggested approach below will minimize the risk of committing a disclosure violation:** The agenda must alert the public to the major issues expected to be discussed at the meeting.⁷⁰
- It is not enough to identify “most” of the major issues to be discussed at the meeting. The failure to disclose even one or two matters of public business expected to be discussed in the public meeting is a FOIA

⁶⁶ *Del. Op. Att’y Gen.* 97-IB20 (Oct. 20, 1997).

⁶⁷ *Chemical Industry Council of Delaware, Inc. v. State Coastal Zone Industrial Control Board*, 1994 WL 274295, at *8 (Del. Ch. May 19, 1994); *see also Del. Op. Att’y Gen.* 08-IB08 (May 23, 2008).

⁶⁸ *Ianni v. Department of Elections of New Castle County*, 1986 WL 9610, at *5 (Del. Ch. Aug. 29, 1986); *see also Del. Op. Att’y Gen.* 01-IB10 (June 12, 2001); *Del. Op. Att’y Gen.* 02-IB20 (Aug. 30, 2002); *Del. Op. Att’y Gen.* 07-IB01 (Jan. 25, 2007); *Del. Op. Att’y Gen.* 07-IB03 (Feb. 23, 2007).

⁶⁹ *See Del. Op. Att’y Gen.* 12-IB04 (Mar. 27, 2012) (finding the posting of a “tentative agenda” to be misleading under the circumstances of the case).

⁷⁰ *See Del. Op. Att’y Gen.* 97-IB13 (June 2, 1997).

violation;⁷¹

- Noting that the agenda “is subject to change” will not excuse the failure to provide public notice of matters of public business expected to be discussed at the public meeting.⁷²
- The matters to be discussed should be described with enough specificity to provide fair notice to the public.⁷³

“Public business” means any matter over which the public body has supervision, control, jurisdiction or advisory power.

FOIA places the burden of proving the purpose of the gathering of a public body on the public body.⁷⁴ The public body is required to include in its agenda or notice the public business to be discussed at a meeting, so that the public has an opportunity to decide whether to attend and observe the discussion.⁷⁵

It is not always clear what constitutes “supervision, control, jurisdiction or advisory power.” For example, in Attorney General Opinion 01-IB13, this Office considered a matter involving a discussion by the City of Dover’s Safety Advisory Committee (“SAC”) of a proposed conditional permit that would allow the expansion of a municipal waste transfer facility.⁷⁶ Neither the City of Dover nor the SAC had the power to issue or deny the permit; that power rested with the Kent County Levy Court.

The SAC discussed the potential for expansion at a meeting without having provided notice of the discussion on the public meeting agenda.⁷⁷ Moreover, at the meeting, the SAC issued a proclamation opposing the permit. This Office found that SAC did not merely conduct an academic discussion that “would have no effect upon the City.”⁷⁸ The purpose of the Council’s proclamation was ‘to persuade’ the Levy

⁷¹ See *Del. Op. Att’y Gen.* 97-IB17 (Aug. 28, 1997) (failure to disclose even one or two subjects constitutes FOIA violation). See also *Del. Op. Att’y Gen.* 05-IB24 (Aug. 18, 2005); *Del. Op. Att’y Gen.* 06-IB15 (July 24, 2006); *Del. Op. Att’y Gen.* 11-IB12 (Aug. 18, 2011).

⁷² See *Del. Op. Att’y Gen.* 03-IB22 (Oct. 6, 2003).

⁷³ See *Del. Op. Att’y Gen.* 03-IB17 (July 31, 2003); see also *Del. Op. Att’y Gen.* 05-IB05 (Feb. 22, 2005); *Del. Op. Att’y Gen.* 05-IB26 (Aug. 29, 2005); *Del. Op. Att’y Gen.* (Sept. 05, 2006).

⁷⁴ See *Del. Op. Att’y Gen.* 96-IB02 (Jan. 2, 1996).

⁷⁵ See *Del. Op. Att’y Gen.* 08-IB07 (May 5, 2008) (determining that the presentation of bylaws is public business and should follow open meeting requirements).

⁷⁶ See *Del. Op. Att’y Gen.* 01-IB13 (Aug. 9, 2001).

⁷⁷ *Id.*

⁷⁸ *Id.* (quoting *The News-Journal Co. v. McLaughlin*, 377 A.2d 358, 360 (Del. Ch. 1977) (holding that the City Council gathering was not merely an academic discussion, but rather a call for possible action by the Levy Court)).

Court not to grant . . . a conditional use permit.”⁷⁹ The DOJ determined that “[t]he decision by the Levy Court will have an impact on waste removal in . . . Dover, a matter ‘over which the City Council clearly had control, supervision and jurisdiction.’ Therefore, the DOJ found the discussion of the permit to be a matter of “public business” that should have been disclosed before the meeting.

Meetings of a quorum of a public body need not be open to the public if there will be no public business discussed. For example, in Attorney General Opinion 96-IB32, the DOJ determined that a school board did not violate FOIA by holding a non-public meeting, where the board members were only asked to comment on the proposed transfer of teachers. The authority to transfer was vested in the school superintendent, not the board; the transfer did not need to be approved by the board.⁸⁰ Because the matter was presented to the board only as a courtesy and the board lacked “supervision, control, jurisdiction or advisory power,” the DOJ found that the meeting did not involve “public business.”⁸¹

“Public funds” are those funds derived from the State or any political subdivision⁸² of the State.⁸³

An organization that receives, expends or disburses any public funds is likely a public body for purposes of FOIA.⁸⁴ The statutory definition of “public funds” is broad, and Delaware courts have adopted a liberal interpretation of the statute.⁸⁵

⁷⁹ *Id.* at p. 3 (quoting *McLaughlin*, 377 A.2d at 360) (internal citations omitted).

⁸⁰ *See Del. Op. Att’y Gen.* 96-IB32 (Oct. 10, 1996).

⁸¹ *Id.*

⁸² The term “political subdivision” (also referred to by Delaware courts as “governmental subdivision”) is not defined in FOIA. However, the Delaware Superior Court has stated: “Governmental subdivisions are sometimes referred to as political subdivisions and they have historically been recognized as creatures of the State with their authority and jurisdiction limited to local issues and areas. They are frequently elected bodies such as counties or authorities with appointed boards, which exercise their powers separate from the State.” *Malinoski v. Kent Conservation Dist.*, 1998 WL 960757, at *1 (Del. Super. Jul. 15, 1998).

⁸³ 29 *Del. C.* § 10002(k).

⁸⁴ *See* 29 *Del. C.* § 10002(h)(1) (“‘Public body’ means . . . [an entity or body], which (1) Is supported in whole or in part by any public funds; or (2) Expends or disburses any public funds, including grants, gifts or other similar disbursements and distributions; or (3) Is impliedly or specifically charged by any other public official, body, or agency to advise or to make reports, investigations or recommendations.”).

⁸⁵ *See Delaware Solid Waste Authority v. News-Journal Co.*, 480 A.2d 628, 633 (Del. 1984) (regular budget allocations to the DSWA were “public funds” even if the allocations were *de minimis*); *The News-Journal Co. v. Billingsley*, 1980 WL 10016, at *2 (Del. Ch. Jan. 29, 1980) (licensing fees collected by the Delaware Association of Professional Engineering are “public

APPENDIX A

Delaware Code Provisions and Rules Affecting Public Access to Government Records and Proceedings

funds” for purposes of FOIA because “they must be paid before one may engage in the practice of engineering in Delaware”).

APPENDIX B

Opinion Summaries for Prior Two Years